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5 Attorney for **D'AMBROGI**

6
7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 vs.

12 DARREN MATTHEW D'AMBROGI,

13 Defendant.
14

2:12-cr-329-GMN-GWF

UNOPPOSED MOTION FOR NUNC
PRO TUNC AMENDMENT OF
JUDGMENT

(Emergency Relief Requested)

AND ORDER

15 Darren Matthew D'Ambrogi moves the court to amend the judgment in this case to reflect
16 a four (4) month sentence instead of a six (6) month sentence. He further moves the court to include
17 a judicial recommendation that the defendant's sentence begin to run on the date of imposition and
18 that the court recommend that he be designated for service of this sentence to the state facility. Mr.
19 D'Ambrogi also requests that the recommendation be made effective *nunc pro tunc* to the date of
20 sentencing (March 8, 2013). This Motion is supported by the following Points and Authorities and
21 the pleadings and papers on file.

22 Dated this 2nd day of August, 2013.

23 Respectfully submitted:

24 /s/ Raquel Lazo

25 RAQUEL LAZO
26 Assistant Federal Public Defender
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1 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

2 **A. Procedural History**

3 On September 5, 2013, D'Ambrogi was indicted in the instant case and a Writ of Habeas
4 Corpus ad Prosequendum was issued to secure his appearance. *See* Indictment (CR #11) &
5 Writ (CR# 17).

6 On September 25, 2012, D'Ambrogi was transferred from the Clark County Detention Center
7 pursuant to the Writ. D'Ambrogi was ordered detained on the instant federal case. *See* Minute
8 Order (#19). However, he remained in primary Nevada State custody serving a 12-month state court
9 sentence on two misdemeanor charges. *See* PSR at ¶ 36. The projected discharge date for this state
10 sentence was December 25, 2012. *Id.* Therefore, as a state prisoner, D'Ambrogi was not
11 accumulating credit towards any ultimate federal sentence. Pursuant to 18 U.S.C. ¶ 3585(b), the
12 Bureau of Prisons does not give a prisoner credit for time already being credited to a state sentence.

13 D'Ambrogi ultimately plead guilty to the instant federal case on October 23, 2012. A pre-
14 sentence investigation report (PSR) issued. The PSR recognized that D'Ambrogi was in primary
15 state custody.

16 Shortly before the sentencing hearing, scheduled for March 8, 2013, undersigned counsel
17 contacted Clark County Detention Center (CCDC) and confirmed that D'Ambrogi had indeed
18 expired his state sentence on December 25, 2012. The CCDC official also confirmed that although
19 D'Ambrogi had other pending state cases he was not being held on any of those cases¹. This meant
20 that D'Ambrogi had therefore entered into primary federal custody on December 25, 2012 - the date
21 his state sentence discharged.

22 Prior to D'Ambrogi's sentencing, United States Probation Officer Kelli Morgan also
23 contacted CCDC and was provided the same information.

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28 ¹ These pending state cases are reflected in the PSR at ¶¶ 45-47.

1 Relying on the information from CCDC, undersigned counsel operated under the fact that
2 during the pendency of the instant case D'Ambrogi fell into federal custody on December 25, 2012
3 and was only in primary state custody for three months – from September 25, 2012 to
4 December 25, 2012 - during the pendency of the federal case.

5 D'Ambrogi was sentenced federally on March 8, 2013. The recommended sentence by
6 probation and the government was nine (9) months but defense counsel was permitted to ask for
7 consideration for the time D'Ambrogi had spent in state custody. Thus, believing that D'Ambrogi
8 was in federal custody as of December 25, 2012, defense counsel requested the court to only vary
9 downward three (3) months (from September 25, 2012 to December 25, 2012).

10 This court granted D'Ambrogi's variance request and sentenced him to six (6) months
11 custody varying downward for credit for lost opportunity to serve the instant case concurrently to the
12 state sentence. Thus, undersigned counsel anticipated that D'Ambrogi's sentence would expire on
13 or about June 25, 2013 (counting six (6) months from December 25, 2012) and advised him as such.

14 On July 25, 2013, undersigned counsel learned from United States Marshal Steve Carpenter
15 that the BOP had actually calculated D'Ambrogi's sentence as expiring on November 21, 2013.
16 According to BOP, Mr. D'Ambrogi fell into federal custody on May 21, 2013 (not
17 December 25, 2012). BOP claims that even though D'Ambrogi discharged his state sentence on
18 December 25, 2012, he remained in state custody thereafter because he was also being held on his
19 other pending state cases. On May 21, 2013, D'Ambrogi was released on the pending state cases.
20 Hence, according to BOP, this is the date D'Ambrogi fell into federal custody and the six (6) month
21 sentence began to run.

22 That D'Ambrogi was being held on any other state case beyond the state case that discharged
23 on December 25, 2013 is contrary to what undersigned and Probation had been told all along.

24 Relying on booking information provided by the CCDC, undersigned counsel erroneously
25 advised D'Ambrogi that he was in primary federal custody at the time of his federal sentencing
26 hearing on March 8, 2013. Undersigned counsel's sentencing request for a variance of three (3)
27 months was based upon this information. Had she known that her client was still in primary state
28 custody on the date of sentencing, she would have instead asked for a variance of five (5) months

1 (approximate credit from September 25, 2012 [initial appearance date] to March 8, 2013 [sentencing
2 date]).² In order to ensure that the federal time began running immediately, undersigned counsel
3 would have additionally asked that the Judgment reflect that the sentence commence on the date of
4 imposition and that D'Ambrogi be designated for service of this sentence to the state facility.
5 Operating on what appears to have been erroneous information, this did not happen.

6 Moreover, the intent of the parties was that defense counsel would request this court to
7 consider all of the state credit. The parties certainly never anticipated that D'Ambrogi would end
8 up serving a sentence of what will amount to 14 months³ if not amended. The parties structured their
9 negotiations (and arranged for D'Ambrogi to be brought over on the writ) so as to avoid unduly
10 increasing his punishment by the fortuity and timing of the separate prosecutions and sentencings.
11 Undersigned counsel has explained the situation to government counsel. After having reviewed the
12 instant motion, the government has no opposition.

13 Accordingly, D'Ambrogi requests that the Judgment be amended to reflect a four (4) month
14 sentence versus the previously imposed six (6) month sentence. This reflects a downward departure
15 of two (2) months (in addition to the previously granted three (3) month variance) in order to account
16 for the period of imprisonment which will only be credited towards the pending state cases (from
17 December 25, 2012 to March 8, 2013). D'Ambrogi further requests that the following language be
18 included in an Amended Judgment:

19 "The court recommends that the sentence commence on the date of
20 imposition of the sentence and that this order shall be effective *nunc pro tunc*
21 to March 8, 2013. This court further recommends that the Defendant be
designated for service of this sentence to the state facility."

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25 ² Technically, the request would have been structured as a 3-month variance for credit
26 for defendant's lost opportunity to run the time concurrent to a discharged state sentence and a 2-
month downward departure pursuant to U.S.S.G. § 5G1.3(c) for the undischarged portion.

27 ³ Counting from his initial appearance on September 25, 2012 to BOP's projected
28 release date of November 21, 2013.

1 In addition to capturing the parties intent, the requested relief will result in a sentence that
2 ensures a reasonable incremental punishment for the instant offense of conviction.

3 DATED this 2nd day of August, 2013.

4 Respectfully submitted:

5 /s/ Raquel Lazo

6 RAQUEL LAZO
7 Assistant Federal Public Defender

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11 **ORDER**

12 **IT IS SO ORDERED** this 7th day of August, 2013.

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16 Gloria M. Navarro
17 United States District Judge
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